SUPREME COURT, U. S.

JAN 15 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-612

BEN DeVORE, et al.,

Petitioners,

vs.

WEYERHAEUSER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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No. 73-612

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COME NOW Petitioners, by and through their attorneys and respectfully petition for a Writ of Certiorari.

In support of the petition, Petitioners represent as follows:

I.

A. Klamath Falls, Oregon, Circuit Court rendered its Findings of Fact and Conclusions of Law on the 10th day of May, 1972. Said Findings of Fact and Conclusions of Law were amended on the 1st day of June, 1972, a copy of which are reproduced in Appendix A hereto, page 15.

B. The Oregon Supreme Court rendered its opin-

ion on the 2nd day of April, 1973, reproduced in Appendix B hereto, page 17, and which is reported in 96 Or. Adv. Sh. 1537, —— P.2d —— (1973). On the 15th day of May, 1973, an order was issued denying a petition for rehearing.

II.

Petitioners seek to invoke the jurisdiction of this Court to review a judgment rendered by the Supreme Court of the State of Oregon entered the 2nd day of April, 1973, concerning which a petition for rehearing was thereafter timely filed and subsequently denied on the 15th day of May, 1973. Thereafter an application for extension of time for the filing of a petition for a Writ of Certiorari was filed with the Supreme Court of the United States, said application being granted on the 30th day of September, 1973, granting Petitioners to and including the 12th day of October, 1973, for the filing of Petitioners' petition for a Writ of Certiorari. The Petitioners believe that the provisions of the United States Statutes and more particularly 29 USCA 158 confer jurisdiction on the United States Supreme Court to review the judgment in question by Writ of Certiorari.

III.

The question presented to this Court is whether the terms of NLRA 29 USCA 158, as adopted, permit the reception of parol evidence to vary the terms and pro-

visions of an industry-wide collective bargaining agreement when such agreement has been reduced to writing; and, whether a state court is bound by the provisions of NLRA 29 USCA 158 and required to rule in conformity with it.

IV.

Petitioners rely on United States Statutes and more particularly 29 USCA 158 (d).

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> > (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty

days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the

provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is re-employed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or

premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, that nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

V.

DeVore, et al, Petitioners, were employees of Weyerhaeuser Company, employed as "pullers" on the green and dry chain in Weyerhaeuser Company's Klamath Falls, Oregon, lumber mill. Petitioners contend they were covered by terms of an industry-wide collective-bargaining agreement entered into between the International Woodworkers of America and Weyerhaeuser Company and sought relief in the Circuit Court of Klamath County asking specific performance of that agreement. The agreement above-referred to was subject to the provisions of the National Labor Relations Act, 29 USCA 158, and specific performance of the agreement was granted by the Circuit Court which said decision was thereafter reversed in the Oregon Supreme Court.

VI.

The "federal question" was first raised upon trial and the trial court found pursuant to Oregon Statutes and the National Labor Relations Act that parol evidence could not be heard, and, therefore, enforced the terms of the agreement as written. See Appendix C

for pertinent quotations from the record of the trial in the Klamath County, Oregon, Circuit Court. This question was also before the Oregon State Supreme Court by virtue of the brief filed by the parties and was resolved by the Supreme Court contrary to the provisions of the said act. See Appendix D for a reproduction of the brief filed by Petitioners in the Oregon Supreme Court with specific reference to pages (19) and (20) thereof.

VII.

Petitioners seek to invoke the jurisdiction of the Supreme Court of the United States of America pursuant to Rule 19.1 (a) and contend that in rendering a decision in the above-entitled matter, the Supreme Court of the State of Oregon decided an issue controlled by federal statute in a way probably not in accord with applicable decisions of the Supreme Court of the United States. The Supreme Court of the State of Oregon accepted parol evidence and used parol evidence to vary the terms of the written agreement and thereby denied the relief of the Petitioners granted to them by the trial court.

VIII.

Attached hereto as Appendix E, please find the administrative opinions of National Labor Relations Board. See Appendix B for reproduction of the opinion of the Oregon Supreme Court and Appendix A

for the reproduction of findings of fact and conclusions of law entered in Klamath County, Oregon, Circuit Court.

IX.

Appendix F attached hereto is the reproduced copy of the Decree Upon The Mandate of the Supreme Court and see Appendix B, Page 38, regarding reproduction of Order on Rehearing.

WHEREFORE, your Petitioners pray for the issuance of a Writ of Certiorari.

Respectfully submitted,

RICHARD C. BEESLEY
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ALAN M. LEE
Attorneys for Petitioners

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF KLAMATH

No. 70-104A-E

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEN E. DeVORE, JOSEPH E. FROST, KENNETH L. DOUGLAS, ROBERT L. BENSON, HOWARD CRAMBLET, ORVILLE FERRELL, EDWARD D. THOMPSON, ROY W. MUSTOE, J. A. WEKKIN, JERRY A. SCHUMANN, GLENN GRAYBILL, BILL FEDERHART, KELLY K. ADAMS, RONALD W. PIERCE, KENNETH A. WILLIAMSON, JULIUS F. OBREMSKI, CLARENCE R. ALSTON, BENNIE M. RODRIGUEZ, ROBERT DUNCAN, JACK E. CANNON, PERCIE L. MELTON, G. B. CRUTCHFIELD, TONY PEREZ, CURLEE ROBINSON, GERALD O. ZIMMERMAN, RONALD G. WILLIAMS, JAMES O. DeVORE, JOSEPH J. NORK, CLAYTON CECIL WIARD, ARGLE LEE HOBBS, REX ALLRED, EMMER W. PLOWMAN, MASON B. SMITH, ROBERT MOZINGO, W. RAY DRAKE, JAMES MARTIN FARLEY, FRANK L. MILLER, TED BUTLER, HOWARD PIERCE, WILLIAM COLT, CHARLES O. RASDAL, THURMAN LEE HOLMES, HAROLD R. GOODNOW, DAVE A. FISHER and CLINTON C. PIERCE,

Plaintiffs,

vs.

WEYERHAEUSER COMPANY, Wood Products,

Defendant.

The above entitled matter having come on for hearing on the 15th day of February, 1972, and the Plaintiffs appearing by Richard C. Beesley and Alan Lee, of their attorneys, the Defendant appearing by Dean E. Peterson and Robert D. Puckett, of its attorneys, evidence having been received, exhibits having been introduced and the Court having taken the matter under advisement, briefs of the parties having been filed and the Court now being advised in the premises, makes the following

FINDINGS OF FACT

I.

All of the Plaintiffs at all times material to the within suit were members of the IWA, AFL-CIO and were employees of the Defendant and working on the dry chain.

II.

That prior to the time in question the Plaintiffs had been employed and paid on a piece rate but that prior to June 6, 1969, they had been placed on a straight hourly rate and were so employed on said date.

III.

That in June of 1969, a conference or negotiation meeting was held in Portland, Oregon, where the Plaintiffs were represented by Western States Regional Council No. 3 IWA and the Defendant was represented by Northwest Forest Products Association. That as a

result of said meeting a settlement agreement was executed the 6th day of June, 1969, to be effective the 31st day of May, 1969; that said agreement provided for certain salary increases in accordance with the then salary schedule of the representative workers. That attached to said agreement as Exhibit "A" was a classification adjustment schedule. A part of Exhibit "A" was a list of exceptions to the salary increase schedule. There was no mention in the schedule of the Plaintiffs being an exception to the schedule as therein set out. That said settlement agreement was in writing and executed by the conferring parties and subsequently approved in accordance with its provisions by the Plaintiffs.

IV.

At the conference in Portland the duly qualified conferees met and adopted the settlement agreement above referred to; that various questions were referred by the conference to subcommittees for study and recommendation. There was evidence that the bracket adjustment applicable to the Plaintiffs was referred to such a committee but there is no evidence that the conference ever acted upon any recommendation on the matter given to the subcommittee.

V.

The Defendant did not pay the Plaintiffs the bracket adjustment provided for in the settlement agreement

of June 6, 1969.

VI.

Subsequent to the adoption of the settlement agreement, a working agreement between the representatives of the Plaintiffs and the Defendant was arrived at. The working agreement in Article III sets out the method of adjusting complaints. The Plaintiffs had a complaint on the basis of their not being afforded a wage adjustment to which they contended they were entitled.

The Defendant has taken the position that the Plaintiffs have no standing in Court because they did not pursue the course set out in Article III of said working agreement. There was testimony that Ben DeVore, as job stewart, contacted the yard foreman, his immediate supervisor, and was advised that the management could not do anything about the bracket adjustment that was being requested by the Plaintiffs.

The Plaintiffs were advised by H. W. Schultz who, at the time was merchandise superintendent, and according to his testimony, management could do nothing locally and the question would have to be referred to the regional level for determination and the Court, therefore, feels that the Plaintiffs went as far as they could in processing their complaint when they were told that the local management could do nothing.

VII.

A written agreement was entered into by the parties through their respective representatives and referred to as Settlement Agreement dated June 6, 1969, which has not subsequently been amended in compliance with the parol evidence rule.

VIII.

That the Defendant has failed to pay the Plaintiffs the bracket adjustment provided for in the Settlement Agreement and that the Plaintiffs have complied with their obligations under said agreement.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

Plaintiffs are entitled to a Decree as follows:

I.

Decreeing that the Settlement Agreement dated June 6, 1969, is a binding agreement entered into by the Plaintiffs and the Defendant.

II.

Decreeing that the Defendant has violated the terms of the Settlement Agreement by refusing to pay to Plaintiffs the bracket adjustment provided for therein.

III.

Decreeing that Plaintiffs be entitled to an accounting setting forth the sums due to them and each of them individually for services rendered to Defendant

since the effective date of the Settlement Agreement and in accordance with the provisions of the said Settlement Agreement.

IV.

For judgment for the several amounts found to be due to the Plaintiffs and each of them as determined in the accounting to be had, plus interest at six percent (6%) per annum from the date of judgment and for their costs and disbursements herein incurred.

V.

Directing the Defendant to specifically perform the provisions of the Settlement Agreement of June 6, 1969, so far as it pertains to the Plaintiffs.

DATED this 10th day of May, 1972.

s/ L. Orth Sisemore
Circuit Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF KLAMATH

No. 70-104A-E

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEN E. DeVORE, JOSEPH E. FROST, KENNETH L. DOUGLAS, ROBERT L. BENSON, HOWARD CRAMBLET, ORVILLE FERRELL, EDWARD D. THOMPSON, ROY W. MUSTOE, J. A. WEKKIN, JERRY A. SCHUMANN, GLENN GRAYBILL, BILL FEDERHART, KELLY K. ADAMS, RONALD W. PIERCE, KENNETH A. WILLIAMSON, JULIUS F. OBREMSKI, CLARENCE R. ALSTON, BENNIE M. RODRIGUEZ, ROBERT DUNCAN, JACK E. CANNON, PERCIE L. MELTON, G. B. CRUTCHFIELD, TONY PEREZ, CURLEE ROBINSON, GERALD O. ZIMMERMAN, RONALD G. WILLIAMS, JAMES O. DeVORE, JOSEPH J. NORK, CLAYTON CECIL WIARD, ARGLE LEE HOBBS, REX ALLRED, EMMER W. PLOWMAN, MASON B. SMITH, ROBERT MOZINGO, W. RAY DRAKE, JAMES MARTIN FARLEY, FRANK L. MILLER, TED BUTLER, HOWARD PIERCE, WILLIAM COLT, CHARLES O. RASDAL, THURMAN LEE HOLMES, HAROLD R. GOODNOW, DAVE A. FISHER and CLINTON C. PIERCE,

Plaintiffs,

vs.

WEYERHAEUSER COMPANY, Wood Products,

Defendant.

The above entitled matter having come before the Court on the Objections to Findings of Fact and Conclusions of Law and Requesting Findings of Fact and Conclusions of Law of the Defendant and the same having been considered by the Court and the Court having reviewed the evidence of the case and finds that objection No. I of the Weyerhaeuser Company should be allowed and that the remaining objections of the Defendant should be denied.

IT IS THEREFORE ORDERED, that the Findings of Fact and Conclusions of Law filed herein the 10th day of May, 1972, be, and the same are hereby amended in the following particulars only:

By striking therefrom the Findings of Fact Paragraph I beginning on line 28, Page 1, and substituting the following:

That Plaintiffs at all times material to the within suit were members of the IWA, AFL-CIO and were employees of the Defendant and working on the dry and the green chain.

DATED this 1st day of June, 1972.

s/ L. Orth Sisemore
Circuit Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

Ben DeVore, et al.,

Respondents,

v.

Weyerhaeuser Company,

Appellant.

Appeal from Circuit Court, Klamath County

L. Orth Sisemore, Judge.

Argued and submitted March 7, 1973.

Dean E. Peterson, Tacoma, Washington, argued the cause for appellant. With him on the briefs were Proctor & Puckett and Robert D. Puckett, Klamath Falls.

Richard C. Beesley, Klamath Falls, argued the cause for respondents. With him on the brief was Alan Lee, Klamath Falls.

TONGUE, J.

Reversed and remanded.

TONGUE, J.

This is a suit in equity by 45 employees of the defendant to recover wages claimed to be due because of a wage increase resulting from an industry-wide "settlement agreement" between defendant and other employers, on one hand, and the unions representing their employees. Plaintiffs' complaint also asks for an accounting for such wages. Defendant appeals from a judgment and decree in favor of plaintiffs.

Defendant contends, among other things, that although the industry-wide "settlement agreement" was a settlement of all "industry-wide issues" between the employers and unions involved in the industry-wide negotiations which led to that agreement, it was not intended to cover so-called "local issues" at particular plants of particular employers, including the hourly rates to be paid to plaintiffs. On the contrary, defendant contends that it was specifically agreed during the industry-wide negotiations that the question of the hourly rates to be paid to plaintiffs was not covered by the industry-wide "settlement agreement," but was to be "left open" and referred back for negotiations and settlement at the "local level."

Plaintiffs contend, on the contrary, that the industry-wide "settlement agreement" was "fully integrated

and closed all issues involved in negotiations"; that it was "complete and unambiguous on its face" and was assented to by the entire negotiating committee, representing both defendant and the "applicable unions"; that it was "voted on by the employees and was ratified"; that "the wage scale increase therein was clear and unambiguous" in that "all hour-rated employees (including plaintiffs) were to receive a general hourly increase plus the 'bracket adjustment,' " and that "no claim has ever been made by defendant of ambiguity."

From these opposing contentions it appears that the principal issues to be decided in this case relate to the application of the parol evidence rule to the facts of this case. It thus becomes necessary to review the testimony, some of which came in under an offer of testimony under ORS 17.045(2) after the trial court had sustained plaintiffs' objection to such testimony as contrary to the requirements of the parol evidence rule, as stated in ORS 41.740. Because this is a suit in equity we review the record de novo.①

1. **Summary of evidence.**

   a. **The previous conversion from piece work to hourly rates for "pullers."**

Prior to 1967 "pullers" on the "green chain" and "dry chain" at defendant's Klamath Falls plant were

paid on a piece work basis. These piece rates were then converted to agreed hourly rates, which were computed by taking an average of compensation paid at piece rates for one year.[9]

At that time there was apparently no discussion as to whether or not these men would receive any or all future wage increases, that being left for future negotiations.

It was agreed, however, that a "trial period" be established for the "green chain" crew from November 25, 1968, to May 2, 1969, at which time the agreed hourly rate would be "permanently established" unless the "average earnings" increased on the basis of the previous "contract earnings," in which event a higher hourly rate would be paid retroactively. As a result, there was some uncertainty as to the exact hourly rate to be paid to these employees in the spring of 1969.

b. **Industry-wide wage negotiations in May and June, 1969.**

In May and June of 1969, industry-wide negotiations were conducted between the Northwest Forest Products Association, representing the employers, including defendant, and two unions representing the employees of these employers. One of these unions, the Western States Regional Council No. 3, International

Woodworkers of America, represented some 20,000 employees and 20 local unions, including the employees of defendant at its Klamath Falls operation, who were members of Local No. 3-12, IWA, AFL-CIO.

Negotiations on behalf of the union were conducted by a negotiating committee which included the regional president and vice-president and three local representatives. Representatives of local unions (including Local No. 3-12) were present as "observers," but had no official capacity in negotiations.

These negotiations were conducted in Portland and were limited to industry-wide issues. The general negotiating committee was broken down into subcommittees to negotiate these various issues. One of these issues involved a "classification" or "bracket" wage adjustment and was referred to a separate subcommittee for negotiation. The "observer" for Local No. 3-12 was "aware" of that subcommittee, but did not attend any of its meetings.

c. Work of the "Bracket Committee" - agreement that remaining local issues be settled at "local level."

This subcommittee negotiated a "classification" or "bracket" wage increase to be paid on an agreed "formula," depending upon the regular hourly rates of the

various employees involved, and payable in addition to a general and uniform increase in hourly rates of pay of all employees. Various exceptions were also agreed upon. The results of these negotiations were then set forth in an agreed schedule, which stated the "basic formula" and its application to various hourly rates, as well as nine "exceptions."

Apparently, however, all of these "exceptions" were industry-wide in their application. At least none were designated as applying only to specified operations of specified employers. In addition, however, it was apparently agreed that a considerable number of "local issues" remained involving application of the "formula" to various job classifications at various specific operations. The negotiated written schedule made no reference to these "local issues," either individually or in any other manner. The reason for this, according to the testimony, was that all of such "local issues" were referred back to the local unions for continued negotiation and disposition. One of these "local issues" involved the "pullers" at Klamath Falls.

d. Discussions at "Bracket Committee" meetings of "local issue" involving "pullers" at Klamath Falls.

In the course of the meetings of the "Bracket Com-

mittee," but not as a part of any discussions by that committee, as such, defendant's industrial relations manager, Mr. Witt (a member of that committee), informed the union regional vice-president, Mr. Palmer (also a committee member), that defendant would not apply the "formula" for "bracket adjustments" to the "pullers" at its Klamath Falls operation. Mr. Palmer's initial response was that the "formula" should apply to them.

Mr. Palmer testified that he then discussed this matter with Mr. Jarvis, the business agent for Local 3-12, who was attending the industry-wide negotiations as its "observer"; that Mr. Jarvis told him that the issues of these "pullers" was "still in grievance or still in the appeal stage at the local union level." Mr. Jarvis testified, however, that although Mr. Palmer reported this matter to him, he told Palmer that this matter had been "negotiated" and that these "pullers" should not be excluded.

In any event, Mr. Palmer then made a verbal agreement with Mr. Witt that the application of the "formula" to these "pullers" should be left "open" in the industry-wide negotiations and be referred "back to the local for an ultimate resolution in the bargaining process."

Mr. Palmer did not recall whether or not he reported

that agreement at that time to Mr. Jarvis, who denied that he did so. Mr. Palmer testified, however, that he reported it to Mr. Nelson, the union regional president (who headed the union negotiating committee) and to the union members of the "bracket committee" and that they had no objection to that agreement. That committee took no formal vote on that matter, however, but apparently operated on a "consensus" basis and on that basis the written schedule was prepared setting forth the "formula" for "bracket adjustments," together with the general exeception to that formula.

e. Execution of industry-wide settlement agreement.

Mr. Palmer, the regional vice-president, also testified that he reported the agreement relating to the Klamath Falls "pullers" to the union bargaining committee and that when it adopted the "settlement agreement" the entire committee was made aware of what the situation was with regard to the "pullers," but that he did not recall whether any local union "observers" were present at that time. On rebuttal, however, he contradicted this testimony and said that he so reported only to the union members of the "bracket subcommittee" and not to the full committee. When the "bracket subcommittee" made its report to the general negotiating committee, as a whole, it appears that no

reference was made to the Klamath Falls "pullers."

In any event, Mr. Witt, defendant's industrial relations manager, testified without contradiction that he reported to the management negotiating committee the agreement that he had reached with Mr. Palmer with respect to these "pullers" at Klamath Falls and that it was after he did so that the final "settlement agreement" was prepared, including adoption of the recommendation of the "bracket subcommittee."

The schedule of "classification adjustments," as negotiated by the subcommittee, was then added and attached as "Exhibit A" to the "settlement agreement," which was apparently adopted on June 6, 1969, by the entire joint negotiating committee without vote, but by "consensus."

The "settlement agreement" of June 6th, by its terms, provided that the negotiating parties "agree to recommend to their members the following in full settlement of all contract issues between the Parties" and includes provisions relating to wages, holidays, vacations, jury duty, health and welfare, equal employment, and call time. It also includes the following provisions for "closure of issues":

> "A. All issues upon which authority to negotiate was delegated by I.W.A. Local Unions to the

Western States Regional Council No. 3, I.W.A., and by L.S.W. Local Unions and District Councils to the Western Council, L.S.W., not covered herein, are withdrawn and closed for the term of this Agreement.

"B. Other issues opened either by Local Unions or by the Association on behalf of its Member Companies are to be deemed closed and withdrawn for the term of this Agreement if unresolved as of the time that this Settlement Agreement is accepted by the Union membership.

"C. This Settlement Agreement shall be deemed to have been accepted by the Unions:

1. By and on behalf of all I.W.A. Local Unions on the date that the Western States Regional Council No. 3 notifies the Association that a referendum vote conducted by the Western States Regional Council No. 3 has resulted in such acceptance."

It was stipulated on trial that the provisions of the "settlement agreement," if applied literally, required payment of the "classification adjustment" to the "pullers" at Klamath Falls.

As previously stated, however, there was testimony by both union and employer representatives that this agreement was intended to deal only with industry-wide issues and not to include "local issues." As also previously stated, both union and industry represent-

atives testified that it was orally agreed that the "local issue" relating to payment of the "classification adjustment" to "pullers" at Klamath Falls was reserved for settlement at the "local level," with the result these employees were not to receive that wage increase in addition to the over-all general wage increase to all employees.

f. Ratification of "Settlement Agreement" - preparation of wage schedule for local working agreement.

Copies of the "settlement agreement" were then mailed by the regional union office to all local unions with the recommendation that it be approved "as submitted" and with ballots to be returned to the council for counting. It was then approved by a vote of the union membership in the region of over 25,000 by a majority of "approximately two to one."

Before the vote of the members of Local 3-12 in Klamath Falls a meeting was held to explain and discuss the "settlement agreement." This meeting was attended by some of the "pullers" who had heard a "rumor" that they were not "covered" by "classification adjustment." The meeting was also attended by Mr. Jarvis, the union business agent.

Mr. Jarvis was asked whether there was anything in the agreement that would exclude the "pullers"

from the "classification adjustment" and replied that he knew of nothing that would exclude them. At that time he apparently did not know about the "side agreement." With that assurance the Klamath Falls "pullers" voted to ratify the "settlement agreement."

Upon ratification of the industry-wide "settlement agreement," it then became necessary to include the terms of that agreement in the separate working agreements for each local union, including Local 3-12. This also involved the preparation of a new wage schedule setting forth the new rates payable for each job classification, after including the increases resulting from the "settlement agreement."

Such a wage schedule was then prepared by defendant and delivered to Local 3-12. That schedule was then attached to the new local working agreement, but did not include the "classification adjustment" for the "pullers."

Meanwhile, however, some "pullers" were paid the "classification adjustment" in their first pay check after the "settlement agreement." Defendant claimed that those payments were made by mistake and deducted them from the next pay checks to these employees.

g. **Renewal of dispute over "pullers." Letter from union regional president stating under-**

standing that they were excluded.

The "pullers" then protested to defendant's foreman and superintendent, who said they could do nothing about the matter. They also talked to Mr. Jarvis, the union business agent. On July 14, 1969, Mr. Jarvis wrote a letter to Mr. Nelson, the union regional president, who had headed the union negotiating committee in the industry-wide negotiations which resulted in the "settlement agreement" of June 6th. Mr. Nelson replied by letter dated July 16th in which he stated, among other things:

> "The Company did raise the question within the subcommittee dealing with classification adjustments, the problem relating to your green chain and dry chain pullers and I believe it was the understanding of the subcommittee members that the entire matter of rates of pay for the pullers as well as the method of pay was still in discussion at the local level and in fact still within some agreed to trial period.
>
> "In any event, it was agreed that should the matter not be resolved satisfactorily at the local Union and Company plant level, upon being so notified, Mr. Witt for the Company and Vice President Palmer for the Union would then review and discuss the matter in further detail."

After some further negotiations in Klamath Falls, meetings were held on October 14th and December

15th in Portland. At that time the "pullers" were again told of the verbal "understanding" in June to leave the matter "open" for further negotiation. An attempt was also made to resolve the matter by negotiations at those meetings, but without success.

On January 3, 1970, Local 3-12 held a meeting to consider the filing of unfair labor practice charges against defendant on behalf of the "pullers." According to a report on that meeting by Mr. Jarvis to the regional president, by letter dated January 6, 1970:

> "It was further explained that this Local Union was not in a position to file charges on the basis that all pullers should get the adjustment formula because of the fact that Western States Regional Council No. III was authorized by this Local Union to represent and negotiate in our behalf in 1969, and that in the course of negotiations, the Regional Council Negotiating Committee agreed with the employers that employees who were covered by a grandfather agreement would be excluded from application of the adjustment formula.
>
> "I am sure that the pullers understood the position this Local Union is in as a result of the agreement that was made, however, they still strongly believe that all pullers should receive the adjustment formula in line with the language contained in the signed 1969 settlement agreement and in light of this, the crew unanimously voted that they did not want the Local Union or the Region to

file unfair labor charges in their behalf.

"In doing so, they fully intend to pursue the matter on their own behalf by filing suit against Weyerhaeuser Company. * * *"

This law suit was then filed.

2. **The industry-wide "settlement agreement" did not "integrate" the oral agreement to exclude Klamath Falls "pullers."**

It is, of course, an understatement to say that the proper test or rule to be applied in determining whether, for the purposes of the parol evidence rule, a written agreement is an "integration" or "merger" of all prior or contemporaneous oral agreements is a matter subject to considerable controversy among the various courts and legal writers.

In **Caldwell, et ux v. Wells**, 228 Or 389, 365 P2d 505 (1961), we stated (at p 395) that:

" * * * [t]he parol evidence rule is described as a rule of integration. **9 Wigmore on Evidence** (3d ed 1940) § 2425; **McCormick on Evidence** (1954), § 213. The rule closes the door to proof only as to those aspects of the bargain which the parties intended to memorialize in the writing. * * *

" * * * * * *

"Whether the parties intended to integrate their

agreement in the writing is a question of fact in each case."

If this were the correct rule, without any further limitations, evidence could always be offered of any prior or contemporaneous oral agreement and in all cases the question whether the parties intended to supersede such an oral agreement by the integration of their entire agreement into the terms of the written contract would be a question of fact which must always be submitted to the trier of the facts, whether court or jury. It may be said, however, with some justification, that the adoption of such a rule, without any limitations, would emasculate, if not "repeal," the parol evidence rule, which is a rule adopted by statute in Oregon, as in many other states.®

In **Caldwell, et ux v. Wells, supra,** this court recognized the existence of such limitations to that rule by holding (at p 395) that "the rule is correctly stated in 1 Restatement 335, Contracts § 240" as follows:

"(1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and

"(a) is made for separate consideration, or

> "(b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."

Upon consideration of the entire record de novo in this case we find that the labor negotiations in May and June, 1969, were not only conducted on an industry-wide basis, but that the "settlement agreement" which resulted from such negotiations was a settlement of industry-wide issues, rather than "local issues," and that the issue relating to the "pullers" at Klamath Falls was a "local issue." Accordingly, we find that the oral agreement that this issue was to be left open for further negotiations on the local level was "such an agreement as might naturally be made as a separate agreement by the parties situated as were the parties to the written contract."

By the express terms of 1 Restatement, **supra** § 240, however, as adopted by this court in **Caldwell**, it is also required that oral agreements be "not inconsistent with the integrated contract." Thus, it is important to note that the written "settlement agreement," although perhaps limited in its substantive provisions to matters which were industry-wide issues, goes on to provide specifically that "other issues opened either by Local Unions or by the Association

on behalf of its Member Companies are deemed to be closed or withdrawn for the term of this Agreement if unresolved as of the time that this Settlement Agreement is accepted by the Union membership."

In view of this provision, we cannot say that this oral agreement to leave open for further negotiations the matter of whether the "classification adjustment" would apply to Klamath Falls "pullers" was "not inconsistent" with this provision of the "settlement agreement," so as to satisfy this requirement of the rule as stated in § 240.

Another possible approach to the problem might have been to contend that the term "issues opened either by Local Unions or the Association on behalf of its Member Companies" was either ambiguous in the legal sense or not applicable to this matter, so as to permit evidence designed to show the intended meaning of that term as applied to this matter. Cf. **3 Corbin on Contracts** 412, § 579 (1960). In this case, however, no contention is made by defendant that any of the terms of the "settlement agreement" were ambiguous and it was stipulated that the terms of that agreement, if applied to the "pullers" at Klamath Falls, would require payment of the "classification adjustment" to them.

Conversely, however, it was admitted by plaintiff's witnesses, including union officers if not expressly stipulated, that at the time of the industry-wide negotiations in May and June, 1969, and the execution of the "settlement agreement" there was an "understanding" between representatives of the union and the defendant that the matter of the application of the "classification adjustment" to the Klamath Falls "pullers" was to be "left open" for further negotiation at the "local level." This "understanding" was later confirmed by letter.

As stated in **3 Corbin on Contracts** 451, § 582 (1960):

> " * * * [t]he oral admissions of the plaintiff that the agreement included matters not contained in the writing may be proved to show that it was not assented to as a complete integration, however complete it may look on its face.* * *"

As also stated in **Yezbak v. Croce,** 370 Pa 263, 88 A2d 80, 81 (1952), and as quoted with approval by **Corbin** (at 451):

> " 'The parol evidence rule is based on the assumption that the written contract contains the full and exact agreement of the parties but where admittedly it does not, the reason for the rule ceases.' "

To the same effect, see **Varriano v. Miller,** 58 NJ

Super 511, 156 A2d 720, 724 (1959).

It appears that Mr. Palmer, the regional union vice-president, who entered into that "understanding" with Mr. Witt, defendant's industrial relations manager, did so pursuant to the admitted authority conferred by Local 3-12 upon the regional council "to represent and negotiate on our behalf" at the negotiations in May and June, 1969.

Accordingly, and for all of these reasons, we hold that the written "settlement agreement" was not an integration of the previously existing oral agreement to exclude these "pullers" from the "classification adjustment," pending further negotiations, and that plaintiffs are bound by that previously existing oral agreement. It follows that the judgment of the trial court must be reversed and the case remanded to it with instructions that plaintiff's complaint be dismissed.

FOOTNOTES

① As in **Springer v. Powder Power Tool Corp.**, 220 Or 102, 107, 348 P2d 1112 (1960), we find that in deciding these issues it is not necessary to choose between state law and federal law by reason of § 301 of the Labor Management Relations Act (Taft-Hartley Act), 29 USCA § 185. On the

contrary, and as in **Springer** (at 107), we find that these issues may be decided by the application of general principles of contract law which presumably form a part of any body of federal law on this subject.

② This agreement also included the "unstacker operator" and the "unloader operator."

③ ORS 41.740 provides as follows:

"41.740 Parol evidence rule. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

STATE OF OREGON
SUPREME COURT
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LOREN D. HICKS
State Court Administrator

May 15, 1973

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Klamath Falls, Oregon

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In re: DeVore v. Weyerhaeuser Co.

Gentlemen:

The Supreme Court has today denied respondents' petition for rehearing in the above matter.

Very truly yours,

s/ J. David Gernant

J. David Gernant
Legal Deputy

JDG:mr
cc: Proctor & Puckett
Attorneys at Law
280 Main Street
Klamath Falls, Oregon

APPENDIX C

Pertinent Quotations from the Records of the Trial in Klamath County Circuit Court, State of Oregon, pp. 134-137.

"Q In conducting your bracket sub-committee business, was there questions raised with respect to the pullers of Klamath Falls?

A Yes, there was.

MR. BEESLEY: I think he can answer that question, but I believe that the defendant now is going to attempt to introduce parol evidence, and by parol evidence vary the terms of the written agreement as it was presented to the local membership for ratification, and we object to any testimony, parol in nature or any evidence parol in nature that would be offered for the purpose of varying this agreement. We would suggest to the Court that at least under Oregon law parol evidence is not really ever an evidentiary rule, but is rather a substantive rule of law that says when parties have met and reduced their information, and agreed to reduce their agreement to writing which is what happened here, and the agreement was presented to the local for ratification, that they are bound by that agreement and cannot vary

the terms of that agreement by parol evidence, and this is exactly what we are reaching at this point. I realize that I might have anticipated this by one question, but I think this is the issue we have to have determined and have determined right here early in the defendant's case, your Honor.

MR. PETERSON: May we respond?

THE COURT: If you wish.

MR. PETERSON: The response of the defense is that I think that counsel is simply making an evidentiary objection to prohibit the illicitation of testimony in evidence for this Court to consider, and I think that he is entirely correct, that the parol evidence rule is a substantive rule of law and not of evidence, and the evidence should be submitted to the Court for this Court to hear and decide whether it should be remembered on a legal basis. I think that the Oregon statute in question which I believe is 41.010 specifically provides that this type of testimony may be illicited to show the circumstances of the parties surrounding the facts.

THE COURT: What is your citation?

MR. PETERSON: 41, I believe. I think I took a picture of it.

MR. BEESLEY: I think I can find it if I could have your book.

MR. BEESLEY: 41.740 and it refers also to another Court section, 42.220 which has to be read with it. There are also some cases that the Court would have to consider in connection with that, your Honor. One of them is as late as 242 Oregon.

MR. PETERSON: For the second point, your Honor, we would suggest that insofar as substantive law is concerned in this proceeding, this is at Section 301, a law suit brought in State Court because it was brought for the purposes of enforcing an obligation, allegedly due under a collective bargaining agreement, that for that reason it would be federal substantive law that is controlling and not Oregon substantive law unless it is determined by the Court that Oregon substantive law on this part were in conformity with the federal rule, and for that reason it seems since the Oregon statute would allow the submission of evidence to show the circumstances of the party and the intent of the parties, the conduct of the parties

and other matters bearing on this transaction, that this evidence should be received by the Court and then weighed in terms of applicable substantive rules."

APPENDIX D

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(1)

PLAINTIFFS' STATEMENT OF THE CASE

A. Omissions and inaccuracies noted in defendant's statement of the case:

> There were no damages sought by this suit; this suit was brought under a third party beneficiary theory for specific performance and accounting. **Springer v. Powder Tool Corp.,** 220 Or 102, 348 P2d 1112 (1960); **18 ALR** 2d p. 804 § 5; **48 Am Jur** 2d p. 804 § 1298; **Simpson on Contracts** 2d Ed 252.
>
> The Taft-Hartley Act, **29 USC 185,** is the applicable law as far as it applies to the factual situation herein. State law may be utilized as long as it is compatible with Federal substantive law. **Avco Corp. v. Aero Lodge, etc.,** 390 US 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968).

B. Plaintiff accepts defendant's statement of facts, with the exception of argumentative portions throughout.

SUMMARY OF PLAINTIFFS' ARGUMENT

1. Settlement agreement is an industry-wide collective bargaining settlement which is by its own language a modifying and amending document, which is to amend existing contracts between em-

ployers and union employees.

2. Said settlement agreement was fully integrated and closed all issues involved in negotiation. It was assented to in its entirety by the entire negotiating committee, made up of representatives from Employer's Forest Products

(2)

Industry and the applicable unions.

3. Said settlement agreement was complete and unambiguous on its face. No claim has ever been made by defendant of ambiguity. This agreement was voted on by the employees and was ratified, and was thereafter binding on all employer-employee contracts. The wage scale increase therein was clear and unambiguous; all hour-rated employees were to receive a general hourly increase plus the "bracket adjustment."

4. The pleadings filed in the trial court closed the issue of whether the plaintiffs were hour-rated at the time of the settlement agreement. In addition, defendant admitted during trial that plaintiffs were hour-rated.

5. Defendant refused to pay bracket adjustment increase claiming a "side agreement" during negotiations, barring plaintiffs from bracket adjustment. Evidence of such agreement was not supported at trial by any memoranda or documentation. The evidence was conflicting, and contradictory and was not by clear and convincing evi-

dence established as to its terms or meanings; further, such oral agreement should not be controlling by virtue of the parol evidence rule.

6. The working agreement (Ab. 69) is an embodiment of the settlement agreement and its modification of former working agreements between plaintiffs and defendant at the Klamath Falls

(3)

plants. Defendant unilaterally drew up a wage schedule four months after the settlement agreement was reached and after plaintiffs had raised issue of bracket adjustment in grievance. Defendant claims during trial and on appeal that the defendant's wage schedule became part of the work agreement by reference even though made unilaterally and in the face of an existing dispute.

7. Evidence clearly shows that there was at the time of the settlement agreement no negotiation or grievance in existence at the Klamath Falls plant between plaintiff and defendant.

8. Trier of fact heard all conflicting testimony and since he was in a position to observe witnesses and demeanor his findings, should be given great weight.

(4)

ANSWER TO ASSIGNMENT OF ERROR I

ARGUMENT

Issues raised:

1. What is the status of the working agreement (Ab 65)?

2. What is the status of the wage schedule (Ex A)?

These are the main issues for the Court to determine. The defendants raised this issue as an affirmative defense for the first time during trial. Prior to trial, during many months of pleading, it was not an issue. At the conclusion of the plaintiffs' case, defendant raised this issue as the sole basis for motion for involuntary nonsuit, which the court denied (Tr 126, 128). For some reason, that ruling was not assigned as a basis for error.

The working agreement "redbook" (Ab 65) is dated November 13, 1969, more than five months after the settlement agreement dated June 6, 1969, (Ab 39) was reached (both the working agreement and the settlement agreement were admitted in the pleadings and were not, therefore, introduced in evidence during trial; constant reference is made to them during the testimony). The working agreement "redbook" embodies the modifications and amendments reached within the settlement agreement (Tr. 153):

> "Working agreements in effect on May 31, 1969, shall be amended only to the extent necessary to reflect the provisions hereof, extended without

> any other change or otherwise shall be closed for the three-year period ending May 31, 1972." (Settlement Agreement) (Ab 48).

Under normal circumstances, it can be assumed for purpose of argument that every third year, the negotiation committee comprised of employers' representatives and union representatives meet and negotiate changes or modifications to existing agreements. After reaching a settlement agreement, a vote is

taken of the union employees for ratification and if ratified, all of the terms of the agreement are adopted and modify existing working agreements between the various employers and union employees for the subsequent three years. In this case, however, after the settlement agreement was ratified by the employees at the Klamath Falls plant, including the plaintiffs on June 19, 1969 (Tr. 49), a telephone call was received by Cavanaugh, the personnel manager at Weyerhaeuser Co., Klamath Falls, from headquarters in Tacoma, which indicated that the plaintiffs were to be paid the general wage increase but not the bracket adjustment (Tr 45). This was the first that the local management knew about the exclusion (Tr. 65). Plaintiffs immediately raised the matter in dispute through

their grievance procedure (Tr. 81).

Approximately one month later, plaintiffs received retroactive pay to the date of the settlement agreement, and five of them also received the bracket adjustment (Tr. 124).

Thereafter, possibly as late as September, 1969, three months after the settlement agreement, and after the plaintiffs had protested not being paid the bracket adjustment, defendant published a wage schedule (Ex. A, Tr. 75, 221). This wage schedule did not conform to the dictates of the settlement agreement bracket adjustment formula in that it excluded the plaintiffs, even though they were hourly-rated employees and under the provisions of the settlement agreement all hourly-rated employees were to receive the bracket adjustment increase, with certain exceptions (Ab. 40, 48).

Defendants propose that the wage schedule (Ex. A) foreclosed all rights of the plaintiffs to the bracket

adjustment, even though it was unilaterally produced by them (Tr. 57). To achieve this result, they employed the incorporation by reference theory through the working agreement. Plaintiffs contend that the wage

schedule has no bearing in the case because:

1. It was unilaterally produced by Weyerhaeuser;

2. Months after the matter had been processed in grievance;

3. It did not conform to Exhibit A of settlement agreement;

4. The working agreement does not specifically refer to the particular wage schedule.

The applicable provisions of the working agreement are found in Art. XIII, p. 33, paragraphs A - I (Ab. 65), relating to wages. Defendant asserts that paragraph E of the working agreement, Art. XIII, incorporates the wage schedule (Ex. A). Paragraph E of the working agreement states:

> "The company shall immediately post existing wage scales for all job classifications in the operation, or at the company's option shall immediately mail the list to the Union, the Regional Council and the International Union. These lists shall be kept up to date. Wherever the company elects to submit the wage scales to the Union as provided herein, such wage scales are not to be posted upon the premises of the company."

When the defendant offered its Exhibit A in evi-

dence, the plaintiffs objected and the trial court received the exhibit, based on the explanation of plaintiff's counsel as to its non-determinative value (Tr. 52-54).

The question becomes one of determining whether the wage schedule is incorporated by the working agreement as alleged. The law is quite clear:

(7)

> "When a written instrument refers **in specific terms** to another writing as containing part of the agreement, the other writing is itself a part of the contract between the parties." (Emphasis supplied)

Weber v. Anspach, 256 Or 479, 483, 473 P 2d 1011(1970)

Cerino v. Oregon Physicians' Service, 202 Or 474, 276 P 2d 397 (1954)

U.S. Fidelity and Guaranty Co. v. Long, 214 F. Supp. 307 (D Ore. 1963)

17 AmJur 2d § 263, p. 666 (cases cited thereunder)

Plaintiffs would submit that the working agreement does not, in specific terms, refer to the wage schedule prepared by Weyerhaeuser and therefore, the wage schedule is merely a secondary document of limited

probative value to the issue of the bracket increase. To allow defendants to use the incorporation by reference theory would be to allow them to produce their own agreement by a bootstrap, without any action by the plaintiffs with regard to it.

Plaintiffs would finally assert that the working agreement (Ab. 65) and the settlement agreement (Ab. 39) must be read together and once that is done, the terms are harmonious.

ANSWER TO ASSIGNMENT OF ERROR II

ARGUMENT

Issues raised:

1. Did the court consider the extrinsic evidence?

2. Was the issue properly raised by the pleadings?

The trial court allowed defendant to introduce evidence of an extrinsic nature, "under the rule", based on an objection to testimony made by plaintiffs (Tr. 134 - 138). The court thus "considered" the evidence offered, but

made no ruling as to its validity or whether under the parol evidence rule it should be excluded (ORS 41.-

740).

The answer filed by defendants (Ab. 49) was silent as to any allegation that the settlement agreement (Ab. 39) was ambiguous, invalid, illegal or fraudulent.

It must be assumed that the trial court, after hearing all the evidence offered, including that offered under the rule, found that the extrinsic evidence offered did not establish any ambiguity or vary the terms or application of the settlement agreement (Ab. 39) and resulting therefore in the conclusion of law by the court (Ab. 54).

> "Decreeing that the settlement agreement dated June 6, 1969, is a binding agreement entered into by plaintiffs and defendant."

Plaintiff thus turns to a consideration of the extrinsic evidence offered to examine whether it must lead to a conclusion that the working agreement and wage scale precludes recovery, as defendant alleges:

I. As to the existence of an oral agreement.

   A. Was such an agreement made?

   B. If so, what were its terms? Did it exclude plaintiffs?

   C. Was it reported to plaintiffs?

D. Were the facts leading to the agreement consistent with such an agreement?

E. Was the agreement ever acted on or reported to the bargaining negotiating committee?

F. If the evidence above is conflicting, what effect, if any, is given to the trial court's determination?

(9)

1. The existence of the alleged oral agreement is based on the testimony of defendant's witness Palmer and defendant's witness Witt. They were members of a nine-man sub-committee entitled "Bracket Committee" (Tr. 133). Mr. Witt and Mr. Palmer discussed the question of the Klamath Falls pullers (the plaintiffs) on two separate occasions (Tr. 138 - 140 and Tr. 205 - 206). The substance of the discussion is based solely on the memory of the two individuals, since there were no notes or written memoranda in evidence (Tr. 175, 183). Both Palmer and Witt testified that the matter of the pullers and the bracket adjustment would remain

open for further negotiation locally (Tr. 141).

2. At no time, was there an agreement that the plaintiffs would be excluded from receiving the bracket adjustment increase (Tr. 146, 149, 176, 187, 206).

3. Whatever the actual terms of the conversation between Witt and Palmer, it appears that it was never reported to plaintiffs by local Weyerhaeuser management prior to plaintiffs' ratification of the settlement agreement (Tr. 47, 75).

4. The background situation between local Weyerhaeuser management and plaintiffs casts

further doubt on the validity of the alleged agreement, because the evidence clearly shows that at the time of the settlement agreement there was no local problem or issue regarding the plaintiffs. Defendant witness Witt testified that initially his position at negotiaton was that plaintiffs should be excluded from bracket

increase and that this was communicated to him from headquarters in Tacoma (Tr. 214). He later testified that he knew of no problem or issue locally involving plaintiffs when he met with Palmer (Tr. 177). Palmer's first position was that plaintiffs should receive the bracket adjustment and this position he maintained throughout (Tr. 138, 146, 149, 176, 183). It then appears from the testimony of Jarvis, local business agent at that time, that Palmer asked Jarvis about plaintiffs during the negotiation. Jarvis testified that there was no local issue involving plaintiffs that hadn't already been settled (Tr. 240). Previous to industry negotiation, two agreements had been made locally changing plaintiffs from piece rate to hourly rate (Def. Ex. E and F). During the industry negotiation, Jarvis had given Palmer and Downing the dates of the local agreements (Tr. 245). Palmer testified Jarvis told him that wages for plaintiffs were

still in negotiation or grievance ap-

peal (Tr. 139); but then couldn't recall when Jarvis told him this (Tr. 139); Jarvis testified Palmer's statement about their conversation was incorrect (Tr. 239 - 241), that there was no problem locally involving plaintiffs (Tr. 240 - 241).

The position of local Weyerhaeuser management regarding pullers during industry negotiations seems to be that they knew of no problem or of the alleged agreement. Cavanaugh, the personnel man, stated that he had no knowledge of a problem until after the settlement agreement was signed and there was nothing to indicate the problem on the Weyerhaeuser copy of the settlement agreement (Tr. 44, 45). Shults, rough lumber superintendent at Weyerhaeuser, Klamath Falls, testified that he had no knowledge of any local problem regarding plaintiffs (Tr. 65) and told his men (plaintiffs) he thought they should receive a bracket increase (Tr. 35).

These background facts are not consistent with the agreement defendant asserts. Rather, it appears from the testimony

cited above, that there were gross misunderstandings between Witt, representing defendant, and Palmer, representing union employees, and this had been further complicated by passage of time

(12)

and no supporting memorandums, notes, tapes, etc. (Tr. 165).

5. Assuming for the moment, that the existence of an oral agreement excluding plaintiffs from the bracket adjustment increase has been proved by a preponderance of the evidence, and plaintiffs had knowledge of the agreement when they ratified the settlement agreement, and that the background situation is consistent with such an agreement, the final question to answer is whether this exclusion agreement was the act of the entire negotiation committee or merely a side agreement between two of the negotiators (Witt and Palmer) during a break in the negotiation sessions. (There is in addition a serious question based on the parol evidence rule

treated in more detail under Answer To Assignment of Error V). If such an agreement was the former, then its validity is established, absent other objection; if the latter, then it would seem invalid. Here, again, the testimony conflicts and is contradictory. Witness Palmer, on direct examination by defendant, testified that the agreement to leave matter involving plaintiffs out was reported to the entire bargaining committee at a regular conference (Tr. 141); then on cross examination by plaintiff, he testified that he couldn't recall reporting it (Tr. 142);

then, he didn't have knowledge of the matter being discussed (Tr. 178); then that the entire committee was aware of it (Tr. 188); then, he reported it to the entire committee (Tr. 191); at that time Mr. Downing was present (Tr. 192); then that he only told union members about the agreement (Tr. 233); finally, that it was never reported to "Big Table" (entire bargaining committee) (Tr. 233).

Mr. Downing, Palmer's associate, in direct contradiction to Palmer, testified that he was on the bracket sub-committee and attended most of the general negotiation meetings and stated firmly that:

"Q. At the general committee meetings at which you were present in whatever your capacity, was it ever expressed by anyone that the pullers at Weyerhaeuser were not included within the settlement agreement?

"A. No." (Tr. 237)

Witt, the defendant witness, agreed that it was never expressed to the entire bargaining committee that pullers (plaintiffs) were to be excluded (Tr. 213).

6. In summary, the testimony surrounding the alleged oral agreement is highly conflicting and contradictory. In the face of this conflict, the Appellate Court, on de novo review, should give substantial weight to the findings

of the trial court who was in a position

to judge the credibility of the witnesses' testimony.

Held v. Held, 94 Adv.Sh. 472, ...Or ....., 493 P 2d 1388 (1972)

27 AmJur 2d § 266, p. 842

ORS 41.740

ORS 42.220

Card v. Stirnweis, 232 Or. 123, 374 P 2d 472 (1962)

Coldiron v. McKenzie, 260 Or 237, 490 P 2d 976 (1971)

Hanan v. Good Samaritan Hospital, 4 Or.App. 178, 471 P 2d 831, 835 (1970)

Rea v. Rea, 195 Or 252, 261, 245 P 2d 884, 888

35 ALR 2d 612

II. The fact that local and further bargaining produced no agreement to pay the disputed wages, plaintiffs contend, does not have any probative value, nor does it add extrinsic weight to the issue, because it was obvious that the two sides were in dispute over the issue after defendant's refusal to pay plaintiffs.

III. Plaintiffs agree that there was no claim filed by the union under National Labor Relations

Board or similar proceedings. Defendant on the other hand, filed an unfair labor practice with NLRB involving this incident. NLRB Case No. 36-C.B.-510, **Weyerhaeuser v. Western States Regional Council No. 3 and Local Union No. 3-12.** Said case was decided

May 6, 1971, against Weyerhaeuser and affirmed on appeal June 16, 1971.

ANSWER TO ASSIGNMENT OF ERROR III

ARGUMENT

The answer to the third assignment of error is in the settlement agreement itself. What is it? What does it claim to be? By its terms, it is the total embodiment of the agreement of the parties. It spells out the rights and obligations of the parties and enumerates those situations when it does not apply. According to rules of law pertaining to interpretation of contracts, it is an integrated agreement.

> "What is integration? An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of

> the agreement; an integration is the writing or writings so adopted." 3 Corbin on Contracts § 540, from Restatement of Contracts § 228.

Furthermore, according to the prevailing rules of construction pertaining to the interpretation of contracts, the following is controlling:

> "Where there is an exception or reservation in a contract, it is presumed that no other exceptions or reservations are intended." **Fendall v. Miller,** 99 Or 610, 169 P 381.

> "The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties, either by design or neglect have omitted by their own contract." **Montgomery v. Board of Education,** 102 Ohio St. 189, 193, 131 N.E. 497, 15 ALR 715; **Goodman v. Sullivan,** 94 Ohio App. 390, 114 N.E. 2d 856, 858.

Defendant would have you consider conflicting testimony, some taken under the rule and some ruled inadmissible but not struck from the record and have you find the instrument

as something less than the parties' agreement. This is nonsense. The writing speaks for itself. The testimony offered under the rule and the matter not struck

must be disregarded, for an equity judge must rule on proper evidence and in the absence of a clear contrary showing, must be deemed to have sorted out non-evidentiary matters and disregarded them in rendering his findings of fact.

> "In equity cases and in an action tried before the court without a jury, the judgment will not be reversed on appeal because of the admission of incompetent evidence on the trial unless the record shows affirmatively that the action of the trial court was influenced by such evidence. The presumption, in such a case, is that the incompetent evidence was finally disregarded by the court, and that the trial judge considered only the competent evidence adduced, in the absence of anything in the record that shows affirmatively that the action of the trial court was influenced by the incompetent evidence* * * *" **Peterson v. State** 61 N.W. 2d 263, 264, 157 Neb. 618 (1953); **3 AmJur, Appeal & Error** § 940, p. 504.

> "It's not necessary that the same strictness as to the admission of evidence be adhered to as when the case is submitted to a jury, as the judge, upon a final determination of the case, is supposed to be able to 'sift the wheat from the chaff', and from the legal evidence alone determine the issues." **Ward v. State,** 105 S.E. 373, 26 Ga.App 61 (1920).

ANSWER TO ASSIGNMENT OF ERROR IV

ARGUMENT

Assignment of Error IV is at first difficult to an-

swer because in posing it, defendant ignores the settlement agreement. Defendant would ask you to find in preliminary negotiation some agreement between Witt and Palmer, then attribute that agreement to plaintiffs and defendant and find ratification of it.

The problem with that argument is that it ignores that the settlement agreement intervened and by its terms

settled all the issues between the parties. Even if there were an oral agreement between plaintiffs and defendant entered into prior to or contemporaneous with the settlement agreement, then such agreement become a nullity upon the adoption of the settlement agreement, as the National Labor Relations Act (Title 29, U.S.C.A.) precludes consideration of any matter except the writing. (See also p. 19.)

The fact of further negotiation in regard to the bracket adjustment is proof of nothing except that the plaintiffs were not paid the bracket adjustment.

Nor does the publication of the working agreement change this, as both it and the settlement agreement must be read together. Moreover, if the working a-

greement settled the issue of the bracket adjustment regarding pullers as is contended by defendants, why did defendant thereafter meet with plaintiffs to negotiate that issue?

"Q. Now, did you have a second meeting at the regional level between Weyerhaeuser and the union and these plaintiffs concerning the application of this disputed wage agreement?

"A. Yes, we did.

"Q. Was that meeting held in December?

"A. As I recall, that was the month.

"THE COURT: December of 1969?

"MR. PETERSON: December of 1969. I have a date here.

"Q. I have the date of December 15th, does that sound right?

"A. That is approximate." (Tr. 149, 150.)

(18)

ANSWER TO ASSIGNMENT OF ERROR V

A. The finding of the trial court:

The trial court found:

"A written agreement was entered into by the parties through their respective representatives

and referred to as the settlement agreement which has not subsequently been amended in compliance with the parol evidence rule." (Ab. 54)

The trial court found that the terms and provisions of the settlement agreement had not been changed or amended by any subsequent agreements in evidence. The parol evidence rule may not as appellant insists, have any bearing on this issue. The findings and conclusions of the trial court do not specify how, if at all, the parol evidence rule was applied. Plaintiffs would argue that since the trial court did not find that any subsequent agreement violated the parol evidence rule, there has been no error to complain about.

For purposes of this argument, however, application of the parol evidence rule by the trial court would be with regard to the admissibility of evidence used to vary or contradict the terms of the settlement agreement (Ab. 39) (ORS 41.740). Nearly all of the defendant's case was heard by the court "under the rule" after the plaintiffs objected to testimony, offered by defendants, to alter the plain meaning of the settlement agreement (Tr. 134-138). It cannot be said therefore, that the trial court excluded any evidence offered or refused to consider it, since there is no way to determine what the court did or did not consider "under the rule." (Refer to Argument Assignment of

Error III.)

Turning to a consideration of the parol evidence rule

(19)

and its applicability, the main issue presented:

B. Is the parol evidence rule applicable in the consideration of prior or contemporaneous oral agreements which are introduced to modify or change a written collective bargaining agreement?

The law as stated in **Lewis v. Young & Perkins Coal Company,** 190 F.Supp. 838, 841 (1960 U.S.D.C. WD Kentucky), both in Federal and State courts, is clear:

> "Written wage agreements were final step of collective bargaining as required by law and embraced entire agreement of employer and union, and evidence of any other contract between them * * * constituted at most oral contemporaneous promise inconsistent with clear and unambiguous terms of written contract so as to be precluded both by parol evidence rule and statute." NLR Act § 8 (d) as amended, 29 U.S.C.A. §158 (d).

See also:

> **Gatliff Coal Co. v. Cox,** 6 Cir, 152 F 2d 52 (1945)
> **N.L.R.B. v. Gulf Atlantic Warehouse Co.,** 291 F 2d 475 (1961)

Local Union No. 1987 of International Brotherhood of Electrical Workers v. Control Products Co. Inc., 330 F.Supp. 250 (1971) U.S.D.C. WD Penn.

State v. Cummings, 205 Or 500, 288 P 2d 1036 (1955)

Huston v. Dickson, 213 Or 115, 322 P 2d 920 (1958)

Houk v. Gilmore, 122 Or 498, 259 P 891 (1927) ALR 2d 1331, 1344

In **Pacific Telephone & Telegraph Co. v. Communication Worker's of America,** 199 F. Supp 689 (1961 D.C. Ore.), the 9th Circuit, in a declaratory judgment case involving an arbitration dispute, held that the dispute must be arbitrated under the terms of the collective bargaining agreement. At page 692, it is stated:

"Where the instrument is unambiguous, parol evidence is not admissible to show the alleged intention of a party." (Cases cited therein)

This case was reversed on appeal (310 F 2d 244 (1962), based on a finding in effect that the agreement regarding arbitration was ambiguous because it was silent as to certain of its terms.

The rule as further stated in **Local Union No. 1987 of International Brotherhood of Electrical Workers v. Control Products Co. Inc.**, 330 F. Supp. 250, 252 (U.-S.D.C. WD Penn. (1971)), is:

> "The court is aware of the legal thesis, consistent with national labor policy that parol evidence is not admissible to alter, change or modify the understanding of the union and the employer (cases cited therein) * * * the only exception which has been recognized as to the introduction of parol evidence allows a party to establish that the collective bargaining agreement was never consummated or never came into existence, because a condition precedent never occurred."

ANSWER TO ASSIGNMENT OF ERROR VI AND VII

Since both Assignment of Error VI and VII deal with the same issue, plaintiffs, for the sake of brevity, will treat them together in argument.

Issues presented:

1. Were the dry-chain plaintiffs grandfather rated?
2. Was the issue properly before the court on appeal de novo?
3. Was the evidence insufficient to establish the agreement alleged in the assignment?

4. If established, would such an agreement be unenforceable as outside the Statute of Frauds.

It appears from the testimony that some of the

plaintiffs were grandfather rated, however, they are not named during the proceedings (Tr. 110). The number was twelve (Tr. 110) and they were the dry-chain pullers.

The issue is posed, however, whether this matter was properly before the court by the pleadings. Defendant's answer did not raise the issue (Ab. 49). When evidence was offered plaintiffs objected and the court heard it "under the rule." Plaintiffs contend such evidence is irrelevant (5 CJS p. 1015, § 1528 (b)).

Even allowing that the issue was properly before the court, was there sufficient evidence of a subsequent oral agreement excluding grandfathers from bracket adjustment? The only testimony of this is as follows:

"Q. (By MR. PETERSON): As in the case of the water truck driver and the case of the railroad engineer, did you reach an agreement that the bracket would not apply to the grandfather rates at that meeting?

"A. (By MR. PALMER): As I recall, that is correct." (Tr. 149)

The law in Oregon is clear that subsequent oral modification of a written contract must be by "clear and convincing evidence."

Mathis v. Thunderbird Village Inc., 236 Or 425, 389 P 2d 343 (1964)

Plaintiffs submit that such a burden has not been met by defendant.

Finally, allowing all the above, is the oral agreement outside the Statute of Frauds and thereby inadmissible? As stated in **Osburn v. DeForce**, 122 Or 360, 257 P 685, 687 (1927):

"Under the statute of frauds the rule is that

parties to a written agreement coming within the provisions of the statute may not, by mere oral agreement, alter one or more of the terms thereof, and thus make a new contract, resting partly in writing and partly in parol. * * *"

Plaintiffs contend that under ORS 41.580(1) and under the "equal dignities" doctrine, any modifying agreement to the written collective bargaining settle-

ment (Ab. 39) must also be in writing.

CONCLUSION

In conclusion, plaintiffs respectfully submit that the findings of the trial court below should be adopted by this Court and the decision herein be affirmed.

Respectfully submitted,

ALAN M. LEE
RICHARD C. BEESLEY

By.....

Attorneys for Plaintiffs - Respondents

APPENDIX E

NATIONAL LABOR RELATIONS BOARD

(Seal)

Office Of The General Counsel

Washington, D.C. 20570

June 16, 1971

Re: Western States Regional Council
No. 3 & Local Union No. 3-12
(Weyerhaeuser Company)
Case No. 36-CB-510

Dean E. Peterson, Esq.
Weyerhaeuser Company
Tacoma, Washington 98401

Dear Mr. Peterson:

Your appeal in the above matter has been duly considered.

The appeal is denied. For substantially the reasons set forth in the Regional Director's letter of May 6, 1971, insufficient basis existed for a finding that on June 6, 1969 the Company and the Union had entered into an oral agreement providing that bracket adjustments agreed upon in the most recent "industry" contract of the summer of 1969 would be excluded from the rates of pullers at the Company's Klamath Falls

plant. Rather the evidence indicated that the Company and Union agreed that further negotiations concerning the bracket adjustments and the classifications in which they would be applied would be left for local negotiations. In this regard it was noted that the evidence did not support the Company's contention that such bracket rates were excluded from the pullers at the Klamath Falls plant by an oral side agreement.

Very truly yours,

Arnold Ordman
General Counsel

By /s Irving M. Harman

Director, Office of Appeals

cc: Director, Region 19
Officer-in-Charge, Subregion 36
Weyerhaeuser Company, Klamath Falls, Oregon 97601

Mr. A. C. Boll, Esq., P. O. Box 1, Oceanside, Oregon 97134

Western States Regional Council No. 3, Int'l. Woodworkers of America, AFL-CIO, 19155 S. E. McLoughlin Blvd., Gladstone, Oregon 97027

(continued on next page)

CERTIFIED MAIL

Re: Case No. 36-CA-510

cc: Intl. Woodworkers of America, Local Union No. 3-12, AFL-CIO, 3836 Altamont Drive, Klamath Falls, Oregon 97061

Intl. Woodworkers of America, AFL-CIO, 1622 N. Lombard Street, Portland, Oregon 97217

Appeal from refusal to issue complaint based on an 8(b)(3) and 8(d) charge filed March 4, 1971, by Weyerhaeuser Company, alleging that since September 11, 1970, the Unions had failed and refused to sign an agreement previously reached in collective bargaining with the Company.

NATIONAL LABOR RELATIONS BOARD
(Seal)
Region 19
1000 Republic Building, 1511 Third Avenue
Seattle, Washington 98101
Telephone (206)583-4532

May 6, 1971

Mr. Dean E. Peterson, Attorney
Weyerhaeuser Company
Tacoma, Washington 98401

Re: Western States Regional Council
No. 3 and Local Union No. 3-12
Case No. 36-CB-510

Dear Mr. Peterson:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

Our investigation discloses that during the negotiation of the most recent "industry" contract in the summer of 1969, a representative of the Charging Party stated that the Charging Party would not apply bracket adjustments agreed upon in the industry settlement to the pullers at its Klamath Falls plant because they had recently received a de facto increase through conversion of their rate of pay from piece rate to an hourly

rate; there is no evidence that a representative of the union at any time agreed that this withholding of payment would take place; but the evidence does show that both the representative of the Charging Party and the representation of the Union agreed at that time that, after the industry contract had been settled, there would be local negotiations respecting the rates of the pullers at Klamath Falls. Such negotiations took place. They did not result in an agreement. Accordingly, there is no "oral agreement" which the Union is obligated to sign. The Union representative has consistently stated that he did agree with the Company representative that there would be local negotiations respecting the pullers' rate after the industry contract was settled, and he has offered to so testify in a lawsuit that the pullers have filed against the Charging Party in an effort to require the Charging Party to comply with the bracket adjustment clause of the industry contract. In view of the foregoing, further proceedings are unwarranted in this matter and I am refusing to issue a complaint.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington,

D.C., 20370, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington,

D.C. by the close of business on May 19, 1971. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Yours very truly,

Charles M. Henderson
Regional Director

cc: General Counsel, National Labor Relations Board, Washington, D.C. 20370

Weyerhaeuser Company, Klamath Falls, Oregon 97601

Mr. A. C. Roll, Attorney, P. O. Box 1, Oceanside, Oregon 97134

Western States Regional Council No. 3, Int'l. Woodworkers of America, AFL-CIO, 19155 S.E. McLoughlin Blvd., Gladstone, Oregon 97627

Int'l. Woodworkers of America, Local Union No. 3-12, AFL-CIO, 3836 Altamont Drive, Klamath Falls, Oregon 97061

Int'l. Woodworkers of America, AFL-CIO, 1622 N. Lombard Street, Portland, Oregon 97217

Sub-region 36, Portland, Oregon

CERTIFIED MAIL NO. 909848

APPENDIX F

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF KLAMATH

N. 70-104A-E.

DECREE UPON THE MANDATE OF THE SUPREME COURT.

BEN E. DeVORE, ET AL,

Plaintiffs,

VS.

WEYERHAEUSER COMPANY, Wood Products,

Defendant.

The above-entitled matter coming on before the Court upon the Mandate of the Supreme Court filed herein, reversing and setting aside the Judgment of the above-entitled Court entered on the 16th day of June, 1972, and remanding the cause for entry of Decree in conformance with the Opinion of the Supreme Court of the 2nd day of April, 1973, and the Court being fully advised; now, therefore,

IT IS HEREBY ORDERED AND DECREED That the Judgment and Decree of this Court made and en-

tered on the 16th day of June, 1972, be, and the same is hereby set aside.

IT IS FURTHER ORDERED AND DECREED That the Plaintiff's Complaint be, and the same is hereby dismissed; and

IT IS FURTHER ORDERED That the Defendant have Judgment against Plaintiffs for the sum of $40.00 for its costs and disbursements.

Dated this 5th day of June, 1973.

s/ L. Orth Sisemore
Circuit Judge.

CERTIFIED A TRUE COPY.

s/ Robert L. Puckett
Of Attorneys for Defendant.